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NOTES.

THE RIGHTS ACQUIRED BY RAILROADS IN STREETS.—The language of the grant by which a railroad is given rights in a street or other highway often fails to determine the precise nature of those rights, and it is rather the exception than the rule for the cases to clearly define them. They are generally spoken of indifferently as franchises or easements, but in a recent case, *Belington & N. R. Co.* v. *Town of Alston* (W. Va. 1904) 46 S. E. 612, it became necessary to determine which of these rights the company held. The defendant's council passed an ordinance allowing the plaintiff to use certain streets for its road, but in doing so failed to follow a statute which provided that no franchise should be granted unless certain formalities were complied with. In a suit to restrain the town from repealing the ordinance it was held that the right granted was an easement.

Where, as in the ordinary case, the fee of a highway or street is in the abutting owner it is difficult to see how an easement could be granted. It is now well settled that in such a case the interest which the public has is not a true easement but only a right of user; *Faust* v. *Huntington* (1883) 91 Ind. 493; *Cincinnati* v. *White's Lessee* (1832) 6 Peters 431, and since no easement could be created out of this right of user the municipality could not grant an easement; nor could it grant any other interest in the highway than some part of this right of user, and such a grant would be a regulation of the public in its user. In some instances, however, the fee to the highway is vested in the municipality, though always in trust for the public and subject to its right of user, Dillon's Munic. Corp. § 628. If a case were possible where a railroad's easement would not conflict with the public use there would seem to be no inherent objection to the grant of such an interest by the municipality; but as a matter of fact the use of a street by a railroad does interfere with the public use, and the municipality must also act in its sovereign capacity as a regulator of this public use

in order to make the grant valid. When the legislature, or its agent the municipal corporation, grants to a transportation company the right to use the public highways it acts with a view to conserving the public good, and the right to lay tracks and run cars is granted for the purpose of enabling the public to better use the highway. The use of the streets by the railroad is a use by the public, and in granting that right the legislature is acting by virtue of its power to regulate the public in its use of the highway. *People* v. *Kerr* (1863) 27 N. Y. 188, 191. The courts have recognized that in making such a regulation of the highway the legislature is acting not as a landowner and parting with a proprietary interest, but in its sovereign capacity, and the right conveyed is a franchise. *San Francisco* v. *S. V. W. W. Co.* (1874) 48 Cal. 493; *Port of Mobile* v. *L. & N. R. Co.* (1887) 84 Ala. 115.

The conclusion seems inevitable that the right in question is a franchise. If it be an easement, it must be an easement in gross and so not assignable, while the right which a railroad acquires is recognized to be transferable where objections of public policy have been removed, *People* v. *O'Brien* (1888) 111 N. Y. 1; *Hall* v. *Sullivan Ry.* (1857) Fed. Cas. 5948; and the same considerations would apply to licenses; indeed where the fee is not in the municipality it does not appear how the license or easement could be transferred to the railroad company in the first instance. But whatever may be the nature of the right granted, it must be shown that the legislature has conferred upon the municipality power to make such a grant. A municipality's ordinary powers do not include power to grant to a railroad company a right to lay tracks, *Eichels* v. *Evansville St. R. Co.* (1881) 78 Ind. 261; *Denver & S. R. Co.* v. *Denver City R. Co.* (1875) 2 Colo. 673, and to justify the decision in the principal case the court would need to find express legislative authority to the municipality to grant the right claimed.

ANNUITIES UNDER THE NEW YORK RULE AGAINST PERPETUITIES.— Prior to 1896, when the present Real Property law was enacted in New York, it was provided by statute that express trusts could be created for the following purposes only: "1. * * *. 2. To sell, mortgage or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term * * . 4. * * *." 1 Rev. Stat. 728, § 55. It was also provided that "No person beneficially interested in a trust for the receipt of rents and profits of lands can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." 1 Rev. Stat. 730, § 63. Reading these sections together it is apparent that § 63 applies to a trust created under § 55, sub-section 3, and that in such a case there is a restraint on the absolute power of alienation of the beneficial interest which, if continued for a longer period than is allowed by the New York Rule against Perpetuities, renders the trust void. If, however, the trust is one under § 55, sub-section 2, it does not come under the strict wording of § 63, and the beneficial interest